IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 22157 of 2005
With
SPECIAL CIVIL APPLICATION No. 23800 of 2005
With
SPECIAL CIVIL APPLICATION No. 2000 of 2001
With
SPECIAL CIVIL APPLICATION No. 23724 of 2005
With
SPECIAL CIVIL APPLICATION No. 22658 of 2005
To
SPECIAL CIVIL APPLICATION No. 22662 of 2005
With
SPECIAL CIVIL APPLICATION No. 23725 of 2005
With
SPECIAL CIVIL APPLICATION No. 23865 of 2005
With
SPECIAL CIVIL APPLICATION No. 23866 of 2005
With
SPECIAL CIVIL APPLICATION No. 12678 of 2005
With
SPECIAL CIVIL APPLICATION No. 20406 of 2005
With
SPECIAL CIVIL APPLICATION No. 20405 of 2005
With
SPECIAL CIVIL APPLICATION No. 20301 of 2005
With
SPECIAL CIVIL APPLICATION No. 24540 of 2005
With
SPECIAL CIVIL APPLICATION No. 24661 of 2005
To
SPECIAL CIVIL APPLICATION No. 24669 of 2005
With
SPECIAL CIVIL APPLICATION No. 22158 of 2005
With
SPECIAL CIVIL APPLICATION No. 22104 of 2005
With
SPECIAL CIVIL APPLICATION No. 21669 of 2005
With
SPECIAL CIVIL APPLICATION No. 22834 of 2005
To
SPECIAL CIVIL APPLICATION No. 22836 of 2005
With
SPECIAL CIVIL APPLICATION No. 22840 of 2005
With
SPECIAL CIVIL APPLICATION No. 8440 of 2004
With
SPECIAL CIVIL APPLICATION No. 23846 of 2005
With
SPECIAL CIVIL APPLICATION Nos.3 to 13 of 2006
with
SPECIAL CIVIL APPLICATION Nos.14333 to 14335 of 2005
with
SPECIAL CIVIL APPLICATION Nos.22641, 21792 and 22667 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE JAYANT PATEL

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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PRAVIN A PARMAR - Petitioner(s)

Versus

SECRETARY YOURH, SERVICES AND CULTURAL ACTIVITIES DEPARTMENT & 2 - Respondent(s)

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Appearance :

MR PINAKIN M RAVAL for Petitioner(s) : 1,
MR DIPAN DESAI, AGP for Respondent(s) : 1,
None for Respondent(s) : 2 - 3.

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CORAM : HONOURABLE MR.JUSTICE JAYANT PATEL

Date : 12/01/2006

COMMON ORAL JUDGMENT

1.Heard Mr.Pinakin Raval, Ms.Sadhana Sagar, Mr.Japee, Mr.Virendra Baheti, Mr.Dagli, Mr.Vyas, Mr.Pandya, Mr.Jaykuar Patel, Mr.D.P.Vora, Mr.Astavadi, Mr.Devang Vyas, Mr.Tandel and Mr.Dalal, learned Counsel appearing for the concerned petitioners as well as Mr.Dipan Desai, learned AGP appearing for the State, Mr.Munshaw, learned Counsel for respondent Kheda District Panchayat

appearing in the concerned petitions and Mr.Mehul Rathod, learned Counsel for respondent No.1 in the concerned petitions.

2. As all the petitions are inter-connected and common questions arise for consideration, they are being considered by this common order.

3. It is not in dispute that all the petitioners are working as part-timer in the respective Department of the State Government or the office is under the direct or indirect control of the State Government. It is also not in dispute that the petitioners were appointed on the concerned posts as part-timer and the duty was for different periods considering the work in which the engagement was there. As per some of the petitioners, their names were called from the Employment Exchange and thereafter the appointments were given as part-timer, whereas such is not pleaded in case of some of the petitioners, but the fact remains that status of all the petitioners are as that of engaged for part-time work in the concerned office of the State Government. The challenge can broadly be classified into two categories; (1) challenge against the termination in capacity as part-timer employee; and (2) challenge to the action of the authority in not regularizing the services on the permanent post by

converting the status of the petitioner from part-timer to full-timer or in alternative, the prayers are for directing the respondent authority to absorb the petitioners on regular scale in the permanent cadre wherever the posts are available and if the posts are not available, the part-timer post may be converted as full-timer and the absorptions may be ordered.

4. So far as the first challenge is concerned, as such it would depend upon the terms and conditions of the appointment. If the appointment of the concerned petitioner is as part-timer, till a particular period, and if the conditions so provide for enabling power with the authority to terminate, such power for termination can be exercised. If the engagement is as daily wager and not for a fixed period, the appointment may be continued till the requirement of the work as daily wager, but if such engagement is discontinued as that of the daily wager, it cannot be validly asserted as of right that the termination is illegal. The reference may be made to the decision of the Apex Court in case of **"Allahabad Bank vs. Premsingh", reported in 1996 (10) SCC, 597,** more particularly the observations made at para 9, of the said decision.

5. However, in a matter where the appointment is there for a fixed period as it is in case of SCA No.22641 of

2005, SCA No.22667 of 2005, SCA No.22658 to 22662 of 2005, SCA No.22724 of 2005, SCA No.22725 of 2005 the position would not be the same. It appears that the power for termination is not exercised for any bonafide purpose, but is exercised with a view to deprive the concerned petitioners from the benefits under the law, as may be available. The perusal of the circular dated 14.10.2005 by Director of Library on the basis of which the impugned termination orders are issued shows that the same is with a view to deprive the employees concerned from their legitimate rights under law and, therefore, it has been communicated for giving an artificial break.

6. The Hon'ble Apex Court has observed that such practice must be deprecated. The reference may be made to the decision of the Apex Court in case of "**Bhagwati Prasad v. Delhi State Mineral Development Corporation,**" reported at 1990(1) SCC, p. 36. It appears that based on the said circular dated 14.10.2005, the termination orders are passed, though the post available are up to 31.3.2006 and, therefore, the impugned termination order, which is challenged in the aforesaid SCAs by the petitioners, who are working as part-timer in the Government Library of the State Government can be said as illegal and arbitrary and as a consequence thereof

the impugned termination order cannot be maintained in the eye of law and deserves to be quashed and set aside.

7. The larger issues are required to be considered in the second aspects of the petition as referred to hereinabove pertain to the right of such part-timer employees for absorption by converting the post from part-timer to full-timer.

8. The contention of the petitioners in all the petitions are that the State Government has issued the circular giving directions to all the Departmental Heads to assess the situation if such part-timer had continued for a period of more than three years and, therefore, it has been prayed that the posts in question are required to be converted as full-timer and the petitioners are required to be absorbed as full-timer on the regular post. It has also been submitted that in certain cases the posts are available and, therefore, if the petitioners are continued as part-timer and are not absorbed on the permanent available posts of full-timer, the same results into exploitation of the petitioners and, therefore, the action would be unreasonable and arbitrary and, in any case, would not be in the larger interest, where the State Government is supposed to act as the model employer. In support

of the submissions made by the learned Counsel appearing for the petitioners, they have relied upon two decisions of this Court; (1) Special Civil Application No.8917 of 1998 decided on 17.12.2004; and (2) Special Civil Application No.1804 of 1987 decided on 1.4.2004. The petitioners have also submitted that as such the decision of this Court in Special Civil Application No.8917 of 1998 and allied matters is based on another decision of this Court in SCA No.1209 of 1994 decided on 20.7.1998 and it has been further submitted that the aforesaid view of this Court in SCA No.1209 of 1994 is followed in SCA No.9296 of 2000 and thereafter the LPA (St.) No.1424 of 2004 was preferred against the decision of this Court in SCA No.8917 of 1998 and the LPA is withdrawn. It has been further submitted that SLP was preferred against the decision of the Division Bench of this Court being SLP (Civil) No.16455 of 2005 arising from the order dated 9.12.2004 in LPA No.2504 of 2005 and the Hon'ble Supreme Court has dismissed the SLP on 16.8.2005 (Page 48 of SCA No.22834 of 2005) and, therefore, it has been submitted that this Court, may take the same view as the matters are covered by the said decision.

9. It may be recorded that when some of the matters being SCA No.22157 of 2005 with SCA No.22158 of 2005 with SCA

No.22104 of 2005 came up for hearing before this Court, this Court had passed the following order on 15.11.2005:

1. *Upon hearing the learned Counsel for the petitioners, it appears that the reliefs are prayed by the petitioners mainly on the ground that in similar circumstances in respect to the very department, this Court has directed for absorption on permanent post on regular basis. Mr.Raval, learned Counsel for the petitioners has relied upon the decision of this Court (Coram: A.H. Mehta, J.) dated 17.2.2004 in Special Civil Application No.8917 of 1998 and others and another decision of this Court (Coram: R.R.Tripathi, J.) dated 1.4.2004 in Special Civil Application No.1804 of 1987. The perusal of both the judgements show that since the petitioner continued as part-timer for the period of about three years by relying upon the circular dated 26.12.1980, the petitioners have been ordered to be absorbed on permanent post.*

2. *Mr.Desai, learned AGP, during the course of the hearing did submit that the said circular dated 26.12.1980 is kept in abeyance due to economic measure as per the circular dated 21.8.1999. It appears that this Court in above referred two*

decisions directed regularisation on permanent post and, therefore, on behalf of the petitioners, it has been submitted that the petitioners would be entitled for the same relief as granted by this Court in the above referred decisions qua other employees.

3. *It appears that for the recruitment in any public employment, the procedure as provided under the recruitment rules are required to be followed. If the appointment of the petitioners are made on temporary basis as part-timers the same cannot be read as appointment made on full time permanent post. If the vacancy of full time permanent post is to be filled up the requirements as per the recruitment rules are to be followed. The petitioners who may be working on part-time basis, temporarily may be considered, but such consideration cannot result into foreclosing the entry to the zone of consideration to the other similarly situated persons in such public employment. If such is permitted, it may result into regularising the back-door entry or conferring the benefits upon the persons who are not selected for the post in question. The reference may be made to the recent decision of the Apex Court in case of* ***"Binod Kumar Gupta and***

***Ors v. Ram Ashray Mahoto and Others", reported in 2005(4) SCC, 209**, more particularly the observations made by the Apex Court for appointments of Class-IV Staff in Civil Courts. The reference may also be made to another decisions of the Apex Court in case of **"Dhampur Sugar Mills Ltd. v. Bhola Singh", reported in 2005(2) SCC, 470** and **in case of "Mahendra L. Jain v. Indore Development Authority", reported in 2005(1) SCC, 639**, whereby the view taken is that daily wager in the absence of a statutory provision would not be entitled to claim regularisation. So far as the settled norms for public employment is concerned and for Court to allow the regular appointment to continue is concerned, it would also be necessary to consider the observations made by the Division Bench of this Court in case of **"Halvad Nagarpalika & Anr. v. Jain Dipakbhai chandravadanbhai & Ors.", reported in 2003(4) GLR, 3229** at para 18 of the said decision. Therefore, in view of the aforesaid decision of the Apex Court, the petitioners, at the most, can be considered together with the other similarly situated persons at the time when the process for filling up of the*

permanent post is undertaken but, in any case, direction cannot be issued to the respondent Authorities to absorb the petitioners on the permanent post, without following the regular process of recruitment and that too, after giving opportunity to all eligible candidates at that time.

4. *It appears that in the aforesaid decisions of this Court, attention of the Court is not drawn to the above referred decision of the Supreme Court and the issue is not examined in detail as to the extent that if such is permitted in public employment, it may result into deprivation of the opportunity to other similarly situated and eligible candidates and also giving premium to the petitioners who are not selected for the post concerned.*

5. *In view of the above, I find that it would be just and proper to refer the matter to the Division Bench. It may be incidentally recorded that against the decision of the learned Single Judge in Special Civil Application No.8917 of 1998 and others, upon which the reliance is placed, Letters Patent Appeal (St.) No.1424 of 2004 was preferred by the Government, but the said LPA is withdrawn as per the order dated 6.10.2005 passed by the*

Division Bench of this Court. It has been stated by the learned Counsel appearing for the petitioner that in the contempt proceedings the order of the learned Single Judge was implemented and thereafter the LPA has been withdrawn.

6. *Be that as it may, but it appears that there is no decision of the Division Bench of this Court brought to the notice of this Court having considered the above referred decision of the Supreme Court.*

7. *Hence, Office to place the matter before the Bench as may be ordered by the Hon'ble the Chief Justice on administrative side. The petitioner to supply second set on or before 17.11.2005.*

8. *In Special Civil Application Nos.22157 and 22158 of 2005 no interim relief has been granted, however, in Special Civil Application No.22104 of 2005, ad-interim relief has been granted against the termination and, therefore, the ad-interim relief granted earlier shall continue till the listing of the matter before the Division Bench on 21.11.2005.*

10. Thereafter the matters were placed before the Division Bench of this Court (Coram: B.J.Shethna and M.C.Patel, J.J.) and on 6.12.2005 the following order was passed by the Division Bench:

"1. All these petitions are placed before this Court in view of the order dated 15.11.2005 passed by the learned Single Judge of this Court.

2. Having carefully gone through the order passed by the learned Single Judge and the judgment of the Hon'ble Supreme Court which is referred to and discussed by the learned Single Judge in his order, in brief, we are of the considered opinion that when there is a Supreme Court judgment, then, the matters were required to be decided by the learned Single Judge in light of the Supreme Court judgment. For that the Division Bench judgment of this Court was not necessary, even if there was a conflicting view taken by different learned Single Judges of this Court. Whereas, in the instant case, two different Hon'ble Judges of this Court took the same view.

3. In light of the above, we are of the considered opinion that all the writ petitions be now placed before the learned Single Judge for passing appropriate orders

on it after obtaining necessary orders from the Hon'ble the Chief Justice. Till then, the interim relief operating in the matters to continue."

11. Thereafter in view of the aforesaid order passed by the Division Bench, the present group of petitions together with the other petitions were placed for hearing before the Single Bench of this Court.

12. Therefore, in the aforesaid circumstances all the matters deserve to be considered also in light of the decision of the Apex Court referred to in the order dated 15.11.2005 in SCA No.22157 of 2005 and the allied matters and others, since the aforesaid decision of the Apex Court could not be brought to the notice of this Court (Coram: Kundan Singh, J.), (Coram: A.H.Mehta, J.) and (Coram: Ravi R. Tripathi, J.) and consequently could not be considered by this Court. It also deserves to be recorded that after the aforesaid three decisions of this Court, the Full Bench of this Court in case of **"Amreli Municipality v. Gujarat Pradesh Municipal Employees Union", reported at 2004(3) GLR, 1** had an occasion to consider the issue which is connected with the subject matter of the present group of petitions and, therefore, the said decision of the Full Bench is also to be considered while deciding the

second aspect raised by the petitioners for seeking regularization and/or absorption on the available permanent posts or by conversion of posts from part-timer to full-timer.

13. It is an un-disputed position that the employment to which this Court is concerned in all the group of petitions is the employment in the State Government i.e., public employment. The constitutional mandate provides that all who are eligible for the posts in question are required to be given equal opportunity for consideration at the time when selection or appointment are to be made in the public employment. The mode of recruitment in public employment for the eligibility criteria may vary from case to case. However, one of the settled norms for filling up of the post of public employment is to invite applications from all the eligible persons and to give opportunity to all eligible persons to apply for the posts and thereafter to consider the applications of eligible persons on the basis of, inter se, merits and thereafter to make the appointment for the posts in question.

14. The post of part-time employment at the first instance cannot be equated with the post of full-time employment. Even if it is considered for the sake of examination that all the petitioners were appointed as

part-timers or in the posts of part-time employment after calling their names from the Employment Exchange, then also their appointment is on part-time basis and even if the contention of the petitioners is accepted as that of no irregular appointment as part-timer, the petitioners can at the most be termed as appointed on part-time basis. Therefore, the appointment of the petitioners are not at all made on full time basis.

15. Even if due to requirement of the work part-time posts are converted as full time posts or new full-time posts are created, such posts should and must be available to all eligible candidates who are meeting with the necessary qualification for the posts in question. If the vacant posts, may be by conversion or creation of new post, are only made available to the petitioners, whose selection is not otherwise of full-time posts, the consequence would be that such full-time posts will not be made available to the other eligible persons and the same may result into deprivation of the rights of other eligible citizens to apply for the posts in question, more particularly when such posts are in public employment. If the deprivation of the opportunity to the candidates who are otherwise holding the necessary qualification, is to be considered, such action not only may not meet with the test of Article

14 of the constitution of India, but would also result into violation of Article 16 of the Constitution of India. Therefore, as such with a view to ensure that the selection process meets with the test of Articles 14 and 16 of the Constitution of India, the recruitment Rules are framed, including that for Class-IV employees and the recruitment process as per the recruitment Rules are required to be undertaken by the concerned Department of the State Government. Any action of the statutory authority for giving appointment in any public employment in contravention to the recruitment rules or without following the recruitment process can generally be said to be illegal. Further this Court while exercising the power under Article 226 of the Constitution would not create a situation compelling the authority to make the appointment dehors the statutory Rules for recruitment or without following the recruitment process, resulting into deprivation of large number of other eligible candidate from being considered for the post in public employment.

16.At this stage, it would be profitable to extract certain observations of the Hon'ble Apex Court on the aspects of status of an employee appointed on particular terms and conditions and seeking a different status or conversion thereof in **“State of M.P. And Anr.**

vs. Dharam Bir", reported in 1998(6) SCC, 165. In the said decision the Apex Court observed at para 26 and 27 as under:

> "26. Whether a person holds a particular post in a substantive capacity or is only temporary or ad hoc is a question which directly relates to his status. It all depends upon the terms of appointment. It is not open to any government employee to claim automatic alteration of status unless that result is specifically envisaged by some provision in the statutory rules. Unless, therefore, there is a provision in the statutory rules for alteration of status in a particular situation, it is not open to any government employee to claima status different that that which was conferred upon him at the initial or any subsequent stage of service.
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> 27. Applying these principles to the instant case, since the respondent admittedly, was appointed in an ad hoc capacity, he would continue to hold the post in question in that capacity. On the promulgation of Rules, therefore, the post of Principal which he was holding could not be treated to have been filled up onregular basis and had to be treated as vacant. In order to make

regular appointment by promotion on that post, the eligible candidates were considered and the respondent, not possessing the required educational qualification, was not found fit or suitable for the post of Principal and was consequently directed to be appointed on regular basis as Vice-Principal as he was found suitable only for that post principally for the reason that he did not possess a Degree or Diploma in Engineering."

17. In case of **"Mahendra L. Jain and Ors. v. Indore Development Authority and Ors.", reported in 2005(1) SCC, 639**, the Apex Court while considering the matter for regularisation of the daily wagers who were later on given monthly salary having found that there is no provision under the standing order observed as under at para 19:

"19. The question, therefore, should arise for consideration is as to whether they could lay a valid claim for regularisation of services. The answer to that must be rendered in the negative. Regularisation cannot be claimed as a matter of right. Illegal appointment cannot be legalised by taking recourse to the regularisation. What can regularise is an irregularity and not an

illegality. The constitutional scheme which the country has adopted does not contemplate any back-door appointment. A State before offering public service to a person must comply with the constitutional requirements of Articles 14 and 16 of the Constitution. All actions of State must confirm to the constitutional requirements. A daily-wager in absence of any statutory provisions in this behalf would not be entitled to regularise(see State of U.P. v. Ajay Kumar and J.W. Krushi Vishwa Vidhyalay v. Balakrishna Soni)".

18.It was further observed at para 39 while considering the status of daily wager on a project work at paragraphs 38 and 39 as under:

In A Umarani (supra), this Court held that once the employees are employed for the purpose of the scheme, they do not acquire any vested right to continue after the project is over [See paras 41 and 43]. [See also Karnataka State Coop. Apex Bank Ltd. Vs. Y.S. Shetty and Others, (2000) 10 SCC 179 and M.D. U.P. Land Development Corporation and Another Vs. Amar Singh and Others, (2003) 5 SCC 388].

It is furthermore evident that the persons

appointed as daily wagers held no posts. The appointments, thus, had been made for the purpose of the project which, as indicated hereinbefore, came to an end. The plea of Dr.Dhawan to the effect that the Appellants in Civil Appeal No. 337 of 2002 were asked to perform other duties also may not be of much significance having regard to our foregoing findings. However, it has been seen that even services of one of them had been requisitioned only for the project work. The High Court, in our opinion, was right in arriving at the conclusion that the Appellants were not entitled to be regularized in service."

19. In case of **"Binod Kumar Gupta and Ors. v. Ram Ashray Mahoto and Ors.", reported in 2005(4) SCC, 209,** while considering the question for appointment of a Class-IV employee, who was appointed in the District Court, it was, inter alia, observed by the Apex Court at para 11 as under:

"11. In our opinion the High Court's conclusion is unimpeachable. Rules 73 and 77, assuming them to be constitutionally valid, do not prescribe the mode for the empanelment of the candidates. In 1992, the High Court framed the Bihar Civil Court Staff (Class-III and Class-IV) Rules, 1992. Rule

7 prescribes advertisements in two daily newspapers in addition to notices on the notice board of the District head quarters as well as the Sub-Divisional Head-quarters. It may be that the Rules had no application in 1990 when the appellants were sought to be appointed. Nevertheless as early as in 1984, the High Court had issued a directive on its administrative side in which it was stated that for appointment to Class-IV staff in the Civil Courts, it would not be necessary to advertise the vacancies in the State level newspapers, but that notices should be placed on the notice board of the respective Civil Court premises and in the local daily newspaper of the District. This directive was binding on the District Judge. In view of the express instructions, it was not open either to the Nazir, or the Judge in-charge or the District Judge or the Inspecting Judge to have acted to the contrary in filling up the posts. Admittedly, there was no advertisement issued in any newspaper at all. Furthermore, as far as the second lot of appointees is concerned, there is no evidence of the District Judge putting up any notice even on the notice board.

20.It was further observed at paragraphs 12 and 13, inter

alia, as under:

"12 Indeed, learned counsel appearing on behalf of the appellants conceded this position but contended that since they had continued to serve for the last 15 years, a selection could be held amongst the appellants 15 to 27.As far as the first 14 are concerned, it is submitted that they should be permitted to continue as there had been an advertisement.

13. The "advertisement" was no 'advertisement' as required by the High Court. Without adequate notice no fair opportunity was given to others who might have applied. Apart from this, it does not appear from the records that there was any selection procedure followed at all. There is no explanation why the Selection Committee had been by passed nor any acceptable reason why the persons who had applied as far back as in 1986 were ignored. This singular lack of transparency supports the finding of the High Court that the appointments were not made bonafide. The District Judge, who was ultimately responsible for the appointment of Class-IV staff violated all norms in making the appointments. It is regrettable that the instructions of the High Court were disregarded with impunity and a procedure evolved

for appointment which cannot be said to be in any way fair or above board. The submission of the appellants that they had been validly appointed is in the circumstances unacceptable. Nor can we accede to their prayer to continue in service. No doubt, at the time of issuance of the notice on the special leave petition, this Court had restrained the termination of services of the appellants. However, having regard to the facts of the case as have emerged, we are of the opinion that this Court cannot be called upon to sustain such an obvious disregard of the law and principles of conduct according to which every judge and any one connected with the judicial system are required to function. If we allow the appellants to continue in service merely because they have been working in the posts for the last 15 years we would be guilty of condoning a gross irregularity in their initial appointment. The High Court has been more than generous in allowing the appellants to participate in any fresh selection procedure as may be held and in granting a relaxation of the age limit."

21. While issuing notice on the SLP the Apex Court had restrained the termination of service of the appellants. The Apex Court further observed that

however, having regard to the facts of the case as have emerged, we are of the opinion that this Court cannot be called upon to sustain such an obvious disregard of the law and principles of conduct according to which every judge and any one connected with the judicial system are required to function.

22. Therefore, in view of the above, the position of law which can be deduced as under:

(i) The status of any person in the employment or one who is engaged in the Government service or in public employment will be dependent upon the terms and conditions, governing the appointment and the nature of the post which he is holding.

(ii) The appointment of any person as daily wager is an engagement on day-to-day basis and is not an appointment on the regular post or a temporary appointment of regular post.

(iii) The regular selection process is required to be followed, including by giving public notice for giving opportunity to all eligible persons of to apply for the post in question, in a case where the recruitment or the appointments are to be made on sanctioned posts, may be as that of Class-IV or Class-III employees. The instructions issued by the higher Authority may operate as a guiding

measure, but such instructions cannot be read to nullify the effect of the recruitment Rules for filling up of the posts in question.

(iv) If the appointment of any employee is made without following any recruitment process, such can be termed as back-door entry and while considering the question of protecting their services, this Court while exercising the power under Article 226 of the Constitution of India would normally not extend protection if the appointment is made by committing illegality. However, if the appointment is made by committing irregularity at the time when the regular selection process is undertaken, this Court on equitable consideration may consider and exercise the power under Article 226 of the Constitution of India for protecting the service of such directly appointed persons, who have competed with other eligible persons.

(v) The appointment made of any person without following regular selection process on a permanent post is to be treated as illegal appointment, unless the person is appointed as daily wager or purely on temporary and adhoc basis, creating no right whatsoever over the post. Such may be

permitted only in extraordinary circumstances, otherwise it is mandatory for the State to fill up all permanent posts by regular selection process after giving opportunity to all eligible persons for consideration.

(vi) The appointment on regular post after undergoing regular selection process is a principle which is required to be followed in every case for every department. It is only in extraordinarily exceptional cases where due to circumstances beyond the control of the appointing Authority, the regular appointment is not made or not possible, the services of qualified persons may be taken either as daily-wager or purely on temporary and adhoc basis with the express stipulation of not to create any right whatsoever in his favour for the post and to relieve him as and when the regularly selected candidate is available.

(vii) In cases where the persons have continued as daily-wager or purely on temporary and adhoc basis for a longer period, such persons may have right to be considered at the time when regular recruitment process is undertaken, but such consideration will be together with all other

eligible candidates, who have right to apply to the post in question and such right for consideration cannot be read in absolute by excluding the right of other eligible candidates to be considered for the post in question.

(ix) When the regular selection process is undertaken and if any person is working as daily-wager or temporary or adhoc basis for the post, the Court may consider the matter for relaxation in age if at the time of entry in the service as daily-wager or temporary, such person was within the prescribed age limit, if there is no express prohibition under the Statutory Rules of recruitment.

23. If the matters are examined in light of the aforesaid principles, it appears that it is an admitted position that all the petitioners are engaged for part-time work and they are not appointed on a full-time post. Therefore, when there is no appointment of any of the petitioners on full-time post, no right can be read of any of the petitioners over any full-time post. Further, even if the full posts are available or sanctioned subsequently, the regular selection process for filling up of full-time posts is required to be undertaken and if the petitioners are eligible, they

may apply together with the other eligible candidates as and when such regular selection process for filling up of full-time post is undertaken.

24. Much reliance is placed upon the Government Instructions dated 26.12.1980 for contending that when the part-time employee has continued for three years, the Head of the Department should make efforts as per the prescribed Recruitment Rules and Procedure for filling up of the posts, to absorb such incumbent for regular posts, as may be available under his control and to replacing incumbent by fresh part-time employees.

25. In the preamble of the said instructions, it has been mentioned that all the Heads of all the Departments may examine the need for continuing the existing arrangement of part-time employment with consolidated pay and if it is found proper, they may forward proposal for converting such post into regular post. Therefore, if the instructions dated 26.12.1980 are read as it is, such permanent posts which may be created are required to be filled up as per the recruitment Recruitment rules and the attempt may be made to accommodate those who are working on part-time posts. The reasonable construction of such instructions, keeping in view of the settled legal

position as referred to hereinabove would mean that such persons who are working on part-timer post may be considered at the time when regular selection process is undertaken for filling up of full-time post. Such consideration as observed herein will be together with all other eligible candidate for the permanent post at the time when the regular selection process is undertaken and such consideration cannot be read as absolute by excluding the rights of other eligible persons to apply and to be considered for the post in question at the time when the regular selection process is undertaken. If the instructions dated 26.12.1980 are read to create an absolute right of absorption in favour of those employees who are working on part-time basis, for consideration on permanent post on full-time basis, such instructions may violate Article 16 of the Constitution of India, because the net effect may result into deprivation of other eligible citizens/candidates to apply and to be considered for the post in public employment. Therefore, it is not possible to accept the contentions of the learned Counsel appearing for the petitioners that the right must be read in absolute for appointment of those persons who are working on part-time posts, by absorbing them in full-time posts as and when the

regular recruitment process is to be undertaken for filling up of full-time posts.

26.It appears that the attention of this Court was not drawn by either side to the decision of the Hon'ble Supreme Court as referred to hereinabove, which were prior to the decision of this Court (Coram: Kundan Singh, J.); (Coram: A.H. Mehta, J.) and (Coram: Ravi R. Tripathi, J.). Further, in view of the subsequent decision of the Apex Court referred to hereinabove, the said decisions are of no help to the petitioners. The attempt made by the learned Counsel for the petitioners that the LPA was preferred against the decision of the learned Single Judge of this Court, upon which the reliance is placed by the petitioners and the SLP was also dismissed in one of the matters and, therefore, the effect cannot be said as diluted, even if subsequently the view taken by the Hon'ble Supreme Court is different, cannot be accepted for the simple reason that neither before the LPA Bench, nor in the SLP before the Hon'ble Supreme Court as such there is discussion on merits regarding the rights of the petitioners as part-timer, much less any attention was drawn of the Division Bench or of the Hon'ble Supreme Court at the time when the LPA or the SLP was decided. Therefore, such contentions of the learned Counsel

appearing for the petitioners cannot be accepted.

27. In view of the above discussion and observations, the relief prayed by the petitioners to direct the respondent authority to absorb the petitioners on regular post of Class-IV employees (full-time) cannot be granted and hence, rejected. It is, however, clarified that as and when the regular selection process of Class-IV regular post (full-time) is undertaken, the petitioners may apply for the post in question if they are fulfilling the eligibility criteria, by competing together with the other eligible candidates and their merit may be considered by the Recruitment Authority/Agency in accordance with law, together with the other eligible candidates.

28. SCA Nos.22157, 23800, 22835, 22836, 22840, 8440 of 2004; SCA Nos.23846, 23865, 22158, 22104, 21669 of 2005; SCA No.2000 of 2001; SCA No.20406, 20405, 20301, 24661, 23866 of 2005 with 24662 to 24669 of 2005 and 22834 of 2005 are dismissed subject to the aforesaid observations.

29. So far as SCA Nos.22658 of 2005 to 22662 of 2005; SCA Nos.23725, 23724, 22667, 22641 and 24540 and 12678 of 2005 are concerned, the prayer for directions to regularise the services of the petitioners, subject to the aforesaid observations cannot be granted. So far

as the challenge to the notice of termination is concerned, at the most the petitioners shall be allowed to continue till the sanctioned part-time post is available i.e., up to 31.3.2006. Therefore, the impugned notice of termination is quashed with the direction that the petitioners shall be continued in service up to 31.3.2006.

30.Additionally so far as SCA No.12678 of 2005 is concerned, the appointment made of the petitioner was as part-time Sweeper and no material is produced on record to show that sanctioned post is available of part-timer till back date and, therefore, if the services are discontinued the same cannot be said to be illegal. However, as and when the regular selection for the post of sweeper is undertaken, the petitioner if eligible may apply together with the other candidates. Hence, subject to the aforesaid observations, the petition is dismissed.

31.In Special Civil Applications No.3 to 13 of 2006, the prayer for direction to the respondent Authority to absorb the petitioners on the full-time post and the consequential prayer for monetary benefits also cannot be granted, subject to the observations that as and when the regular selection process is undertaken for full-time post, the petitioners may apply together with

the other eligible candidates, if the petitioners are eligible for the post in question.

32.Mr.Tandel, learned Counsel appearing for some of the petitioners in the group additionally submitted that as such vacant, sanctioned posts are available and they are not filled up, but the respondent authorities are taking full time work from the petitioners.

33.As such whether the work is taken as that of full-timer though the petitioners are appointed as part-timer cannot be concluded unless full-fledged inquiry is undertaken by leading the evidence after giving opportunity to both sides. At the same time, it deserves to be observed that if the work is taken as that of full-timer and the appointment is as that of part-timer, it may result into exploitation, but before such aspect is concluded, after a full-fledged inquiry, no relief can be granted in favour of the petitioners. The petitioners may resort to appropriate remedy as may be permissible in law.

34.Mr.Tandel, learned Counsel appearing for the petitioner lastly submitted that, in any case, the direction may be given by this Court to the respondent Authority to fill-up the vacant posts, subject to the rights of the petitioners to apply together with the other candidates, as per the observations made by this

Court hereinabove.

35. In normal circumstances, as observed earlier when the sanctioned posts are available, unless there is a ban on recruitment by way of policy decision or due to non-available of financial resources, it would be expected for the competent authority to undertake regular selection process to fill-up the posts. It deserves to be recorded that due to the delay caused in filling-up of the regular posts after the regular selection such complications of engagement of daily-wagers or temporary or adhoc employees are resulted. If the sanctioned posts are available and the regularly selected persons are appointed, there may not be requirement for engaging even daily-wager or any person on temporary or adhoc basis till the regularly selected candidate is available. Therefore, attempt must be made by all concerned to see that the posts are filled up by regular selection after undergoing regular selection process as per the recruitment rules. Therefore, if there is no ban on recruitment or there is no other policy decision not to fill up the posts due to non-availability of sufficient financial resources or other valid reasons known to law, it would be required for the competent authority to undertake regular selection process as per the recruitment rules

to fill up permanent available posts and at that stage as observed hereinabove, together with the other eligible candidates, the petitioners, if they are eligible, may apply for the posts in question.

36.The respondent authority shall consider the matter for filling up of the available permanent posts in accordance with law after undertaking the regular selection process and if there is no ban on recruitment or there is no policy decision not to fill up the posts on account of non-availability of sufficient finance or for other valid reasons known to law, the attempt shall be made to fill up the posts as early as possible, preferably within a period of six months from the date of receipt of the order of this Court. The petitions shall stand disposed of accordingly.

37.So far as SCA Nos.14333 to 14335 of 2005, are concerned, the prayer of the petitioners to grant regular scale of a permanent post and/or for absorption cannot be granted and hence, subject to the aforesaid observations, the same is rejected. The petitions shall stand disposed of accordingly.

38.In SCA No.21792 of 2005, Mr.Vora, learned Counsel appearing for the petitioner submitted that the challenge is against the action of oral termination and the contention is that juniors to the petitioners are

retained in service, whereas services of the petitioners are terminated. As such, the retention of senior on the temporary posts in comparison to the junior is a matter which may fall within the provisions of Industrial Disputes Act. However, such principles normally can be made applicable even if adhoc or temporary employees are to be retained in the same status. No affidavit in reply is filed on behalf of the respondent authority. Therefore, it would be appropriate to direct the respondent to examine the aspect as to whether any junior to the petitioner is retained as part time employee and, if the anser is yes, then the petitioner shall be reemployed on the same status of part-timer and with the same pay scale which was at the time of termination. In case, the post is not available, then the junior-most may be relieved after following the procedure in accordance with law . However, prayer of the petitioner to direct the respondent to appoint petitioner as full timer, subject to the observations made hereinabove for consideration at the time of regular recruitment by competing with other eligible candidate cannot be granted. Petition partly allowed to the aforesaid extent.

39.It is made clear that the rejection of the prayer for

absorption or regularisation by this Court hereinabove shall not operate as a bar to the concerned authority in continuing the engagement of the concerned petitioners, who are working as part-timer on temporary basis or on daily wages as daily wager, if otherwise permissible in law.

(Jayant Patel, J.)

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